

Hague Case Law: Latest Developments

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Published online: 14 November 2016

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International Court of Justice

- (1) *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom, Marshall Islands v. Pakistan, and Marshall Islands v. India)*

On 5 October 2016, the International Court of Justice (ICJ) rendered its judgment in three cases initiated by the Marshall Islands against respectively the United Kingdom (UK), India and Pakistan concerning the (absence of) negotiations on the cessation of the nuclear arms race and nuclear disarmament. According to the Marshall Islands, the respondent states had breached, amongst other things, their obligations under Article VI of the Non-Proliferation Treaty (NPT) (the UK) and customary international law (the UK, India and Pakistan) to pursue, in good faith, nuclear disarmament under strict and effective international control. The Marshall Islands sought to find the jurisdiction of the Court on the basis of the declarations made by the respondent states under Article 36(2) of the Statute of the Court.

The Court ruled (by eight votes to eight with the president's casting vote) that it did not have jurisdiction to hear this case since the Marshall Islands had failed to establish that a dispute existed with the respondent states. First, none of the statements made by the Marshall Islands within the framework of various multilateral fora articulated an alleged breach by the respondent states of their obligations under Article VI NPT or customary international law. Second, the

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submission by the Marshall Islands of its application to the Court is as such insufficient to establish a dispute with the three respondent states. Third, the respondent states' voting records on nuclear disarmament in multilateral fora were also insufficient to conclude the existence of a dispute. Finally, the conduct of the respondent states did not provide a basis for finding a dispute between the Marshall Islands and the UK, India or Pakistan.

Permanent Court of Arbitration

(1) *Duzgit Integrity Arbitration (The Republic of Malta v. The Democratic Republic of São Tomé and Príncipe)*

On 5 September 2016, an Arbitral Tribunal constituted under Annex VII of the United Nations Convention on the Law of the Sea (UNCLOS) and facilitated by the Permanent Court of Arbitration (PCA) rendered its award in the dispute between Malta and São Tomé concerning the arrest of the *Duzgit Integrity*, a vessel sailing under the flag of Malta, on 15 March 2013, and the measures undertaken by São Tomé in relation to that vessel, including the detention of the ship and its master, the confiscation of the vessel and its cargo, and various fines imposed on the master, the owner and the charterer of the vessel. The *Duzgit Integrity* was involved in a ship-to-ship cargo transfer in São Tomé's archipelagic waters.

The Tribunal held that it had jurisdiction to hear this dispute and that Malta's claims were admissible. Subsequently, the Tribunal ruled, among other things, that São Tomé had violated its obligations under Article 49(3) UNCLOS. Although São Tomé's actions on 15 March 2013 in relation to the *Duzgit Integrity* (detaining the vessel and proceeding onshore) were not unlawful, since the *Duzgit Integrity* had not obtained permission from São Tomé to carry out transshipments in São Tomé's archipelagic waters, the Tribunal held that São Tomé's enforcement measures (the prolonged detention of the master and the vessel, most of the monetary sanctions, and the confiscation of the entire cargo) were disproportionate and therefore unreasonable. After all, the exercise of a coastal state's powers under UNCLOS is subject to the principle of reasonableness, which encompasses the principles of necessity and proportionality. Therefore, São Tomé had not exercised its sovereign rights in conformity with its responsibilities under Article 49 UNCLOS and Malta was entitled to seek reparation for damages, to the extent that it can establish causation between the losses and São Tomé's unlawful conduct.

International Criminal Court

(1) *Prosecutor v. Bemba*

On 21 June 2016, Trial Chamber III of the International Criminal Court (ICC) sentenced Bemba to 18 years' imprisonment. Bemba was President of the *Mouvement de libération du Congo* (MLC), a political party founded by him, and

Commander-in-Chief of its military branch, the *Armée de libération du Congo* (ALC). He is a national of the Democratic Republic of Congo (DRC) and was a member of the Senate of the DRC at the time of his arrest. He was prosecuted in relation to crimes committed in the Central African Republic (CAR) between 26 October 2002 and March 2003.

On 21 March 2016 Bemba was convicted of crimes against humanity (murder and rape pursuant to Article 7(1)(a) and (g) ICC Statute) and war crimes (murder, rape and pillaging pursuant to Article 8(2)(c)(i), Article 8(2)(e)(vi) and Article 8(2)(e)(v) ICC Statute). He had deployed an MLC contingent of about 1500 men to CAR upon the request of the former president of CAR, Patassé, to help him to counter forces loyal to his former Chief of Staff. The Trial Chamber concluded that the MLC soldiers directed a widespread attack against the civilian population and committed many war crimes within the context of the non-international armed conflict in CAR.

The Trial Chamber found two aggravating circumstances in relation to the crime of rape (it was committed against particularly defenseless people and with particular cruelty) and one in relation to the crime of pillage (particular cruelty). Further the Trial Chamber took into consideration Bemba's own culpable conduct, which it considered to be of serious gravity. His failure to take action was deliberate and aimed to encourage the attacks against the civilian population. The Trial Chamber found no mitigating circumstances.

(2) *Prosecutor v. Al Mahdi*

On 27 September 2016, Trial Chamber VIII of the ICC rendered its judgment in the case against Al Mahdi. Al Mahdi was a member of an armed group known as Ansar Dine, which was party to the non-international armed conflict in Mali. Al Mahdi was prosecuted for war crimes (intentionally directing attacks against protected objects) committed between 30 June and 12 July 2012 in Timbuktu in Mali. Ten of the most important and well-known religious and historic sites in Timbuktu were attacked and destroyed, almost all of which had the status of protected UNESCO World Heritage Sites. Following a plea agreement on 18 February 2016, the Trial Chamber convicted Al Mahdi of the war crime of attacking protected objects as a co-perpetrator under Articles 8(2)(e)(iv) and 25(3)(a) of the Statute. According to the Trial Chamber, he exercised joint control over and was fully implicated in the execution of the attacks. The Trial Chamber found no aggravating circumstances and five mitigating circumstances (the admission of guilt; cooperation with the Prosecution; remorse; the initial reluctance to commit the crime; and good behaviour) and sentenced Al Mahdi to 9 years' imprisonment.

(3) *Prosecutor v. Bemba et al.*

On 19 October 2016, Trial Chamber VII of the ICC rendered its judgment in the case against Bemba, Kikolo, Mangenda, Babala and Arido concerning the situation in the Central African Republic (CAR). Bemba was President of the *Mouvement de libération du Congo* (MLC), a political party founded by him, and Commander-in-

Chief of its military branch, the *Armée de libération du Congo* (ALC). He is a national of the Democratic Republic of Congo (DRC) and was a member of the Senate of the DRC at the time of his arrest. Bemba was convicted of crimes against humanity and war crimes on 21 March 2016 and sentenced to 18 years' imprisonment on 21 June 2016. Kikolo is Bemba's former counsel; Mangenda is a former member of Bemba's defence team; Babala is a political ally of Bemba; and Arido was a potential witness for Bemba who ultimately did not testify. All five accused were prosecuted for various offences against the administration of justice in relation to the case against Bemba.

The Trial Chamber convicted the accused of multiple offences, in particular corruptly influencing defence witnesses and having presented their false evidence and soliciting, inducing or aiding and abetting in the giving of false testimony.

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